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OGC HAS REVIEWED.

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11 April 1949

General Counsel

Employment of Retired Army Officers

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1. The questions contained in the enclosed memorandum from Mr. [REDACTED] have been reviewed together with the appropriate law, and the following opinion is submitted for your advice.

2. It is our understanding that OPC is now seeking the "temporary but relatively extended" services of a regular army officer, who is retired for other than physical disability.

3. Generally, the status of a retired army officer is that of a person holding an office under the United States Government. The statutes prohibiting the holding of two offices or receiving dual compensation from the Government are several and somewhat ambiguous. In order to ascertain the general meaning of their provisions, they must be considered together. Reference is made to Title 5 of USC and the sections given below are part of this Title.

4. Section 59a provides that no person holding a civilian office or position under the U. S. Government shall be entitled, during the period of his incumbency, to retired pay from the United States for services as a commissioned officer in the army, at a rate in excess of an amount which, combined with the civilian salary, exceeds \$3,000. Such person, however, may make an election between the salary and the retired pay. Section 62 provides that no person shall hold two offices under the Government if the compensation of \$2,500 is attached to either. Sections 69 and 70 are prohibitions against the payment and receipt of compensation for services in the case of anyone already holding a position as a Government officer.

5. The restrictions of sections 69 and 70 are not an obstacle, since they have not been considered applicable when the additional service has not been incompatible with the basic work. In the present instance, of course, there is no conflict between the arbitrary "office" created by the retired status and the work to be performed for CIA. If the anticipated compensation from CIA exceeds \$3,000 when it is added to the retired pay, then section 59a requires the employee to make an election between the compensation and the pay. Section 62 restricts the salary to \$2,500 only when the additional work is considered an "office" so which a fixed salary is attached. In applying this limitation, "office" has been defined as "a public station or employment conferred by the appointment of Government." The term embraces the idea of tenure, duration, emolument, and duties. "Salary", in turn, carries the connotation of "a fixed periodical compensation paid for services rendered; or a stated com-

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compensation amounting to so much money a year, month, or other fixed period, to be paid to public officers or persons in some private employment, for the performance of official duties or the rendering of services of a particular kind, more or less definitely described. (Black's Law Dictionary, 3rd Ed.) It thus appears that a retired army officer could be hired by CIA, provided he makes an election between his retired pay and the compensation. It is our understanding that the compensation in this case would be considerably higher than the retired pay and that he would probably choose to forfeit the latter. The forfeiture, however, works only during the period he is compensated for his work in the Agency. However, the work in the Agency must not be of such continuing nature that it will be considered an "office", nor should it carry compensation at a fixed or annual rate which would be interpreted as a "salary".

6. In an opinion of the Comptroller General dated 29 December 1948 H-30196, the Comptroller considered the propriety of the contract employment of a retired naval officer by the AIC as a consultant upon an intermittent basis. The situation is almost identical to the one presented by you and the opinion is useful in determining the acceptable work period and the type of compensation. In that case, the officer was employed under a contract providing for compensation on a per diem basis when actually working. He was entitled to retirement pay for other than disability reasons. The Comptroller cited his previous opinion in 26 Comp. Gen. 301 as holding that a retired officer employed solely in an advisory capacity -- who was paid for each separate consultation -- was not holding a "civilian office or position" within the meaning of that phrase as used in Section 59a. However, he stated that holding was intended as excepting from the provisions of (Section 59a) all retired officers merely because of their employment designation, for administrative purposes, as "consultants" -- a title which necessarily implies a rendition of a certain amount of consultative services, comprising the expression of views and the giving of opinions and recommendations, but which does not necessarily limit the services thereunder to a narrow confines. Rather, said holding was based upon the proposition that if the duties required were purely advisory, and the compensation is therefore on a fee basis as distinguished from a purely salary basis, the status of the employee is not such as would constitute the holding of an office or position within contemplation of (Section 59a). The particular one of the enumerated elements is considered as determinative of the matter. On the contrary, the absence of any one of such elements is sufficient to take a particular case out of the rule and it was considered a fact basis and he was therefore on an hourly basis subject to the limitations of 59a. The restrictions, however, were held to be applicable only to such days as the officer received compensation for his civilian work. On days when he performed no civilian work, he was entitled to his full retired pay.

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7. In specific answer to the questions raised in paragraphs 2.a., b. and c. of your memorandum, it is our opinion that we may contract with the prospective recruit on an intermittent basis for compensation in the form of a fee which is not determined by the actual amount of time worked. We are not aware of any Comptroller General's decision ruling on the waiver of retired pay when a person is employed on a fee basis. The question of dual compensation has been a constant source of disagreement and confusion since it was first raised well over a hundred years ago, and it is not much nearer solution now than then. While we do not believe that an employee on a fee basis is necessarily required to waive his retired pay, any challenge could most certainly be met on firmer ground if the claim to retired pay was in fact relinquished. In this regard, only retired pay for the days when the employee performed no work for the Agency would have to be forfeited, but the forfeiture would work for the entire day regardless of the extent of the employee's services to the Agency on that day. If it is decided to effect a waiver, notice should be given at the commencement and termination of employment with the Agency to the following office:

Retired Pay Branch
Finance Office, U. S. Army
Second and K Streets, S. W.
Washington 25, D. C.

During the interim period, monthly reports would be required to specify the actual number of days worked in the Agency.

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Sub. Act.

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